

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JONATHAN E. HOLTZ,

Plaintiff,

v.

SKANSKA U.S.A., INC.,  
MAJA EGNELL, and  
THOMAS CRANE,

Defendants.

CASE NO. 13-5985-RJB

ORDER ON DEFENDANTS'  
MOTION FOR SUMMARY  
JUDGMENT

This matter comes before the court on Defendants' Motion for Summary Judgment, filed on September 15, 2014. Dkt. 20. The Court has considered the file, including the pleadings filed in support of and in opposition to the motion. Because material issues of fact exist regarding Defendants' claims, the Court should deny summary judgment, except as to defendant Thomas Crane.

I. PROCEDURAL HISTORY

1 Plaintiff Jonathan Holtz filed claims for age and gender discrimination against Skanska  
2 USA, Inc. (“Skanska”), his former supervisor Maja Egnell, and his former supervisor Thomas  
3 Crane under the Washington Law Against Discrimination (“WLAD”), RCW 49.60. Dkt. 1. Filed  
4 on October 17, 2013, in Clark County Superior Court, the action was removed to this Court on  
5 November 13, 2013, on the basis of diversity jurisdiction. *Id.* On September 15, 2014,  
6 Defendants filed this Motion for Summary Judgment. Dkt. 20. Plaintiff responded with his  
7 Memorandum in Opposition to Defendants’ Motion for Summary Judgment (Dkt. 28) on  
8 September 29, 2014, and Defendants replied on October 16, 2014 with their Reply in Support of  
9 Defendants’ Motion for Summary Judgment (Dkt. 35).

## 10 II. RELEVANT FACTS

11 Plaintiff worked for defendant Skanska and its predecessor companies for seventeen  
12 years. Dkt. 28 at p. 1. Skanska, one of the largest construction companies in the U.S., is the U.S.  
13 subsidiary of Skanska AB, based in Sweden. Dkt. 24. Plaintiff has a Bachelor’s of Science degree  
14 in Civil Engineering and a Master’s Degrees in Business Management and Civil  
15 Engineering/Construction Management. Dkt. 28 at p. 1. From 2004 until his termination in  
16 August 2013, Plaintiff was Skanska’s Senior Director of Learning. Dkt. 20 at p. 2. Plaintiff’s  
17 duties included developing core training curricula and classes; teaching training courses;  
18 providing training for new performance management systems; managing training committee  
19 meetings; managing his department’s budget; determining training needs for employees; and  
20 assisting with the development of a new learning management system. Dkt. 20 at p. 3. Some  
21 dispute exists regarding whether Plaintiff had additional duties outside of these listed. *See* Dkt.  
22 35 at p. 3; Dkt. 29 at p. 6; Dkt. 37-1 at pp. 5–11.

1 In 2011, Skanska began developing a new learning management system. Dkt. 20 at p. 3.  
2 Skanska employee Ola Grenner was project manager for the development of the new learning  
3 management system. *Id.* Because Plaintiff was Senior Director of Learning, Mr. Grenner worked  
4 with Plaintiff in developing the new learning management system. *Id.* Mr. Grenner stated in his  
5 deposition that he had “a constant struggle” with Plaintiff’s performance, which he  
6 communicated to Plaintiff’s supervisor, Maja Egnell after she became Plaintiff’s supervisor in  
7 January 2013. *Id.* Although Mr. Grenner indicated in his declaration that he discussed staying  
8 focused on the project’s priorities with Plaintiff, Plaintiff stated in his declaration that he was  
9 unaware of the depth of Mr. Grenner’s concerns. *See id.* at p. 5; Dkt. 29 at p. 3.

10 Similar to Mr. Grenner, although Ms. Egnell stated in her declaration that she was  
11 frustrated by Plaintiff, she only communicated her frustration to him a few times. Dkt. 24 at p. 2;  
12 Dkt. 29 at p. 3. Ms. Egnell claims in her declaration that she counseled Plaintiff regularly in 2013  
13 about focusing on one assignment at a time. *Id.* While Plaintiff admitted that Ms. Egnell  
14 “chastised” him once about sending out a meeting agenda prematurely, he denied in his  
15 declaration that he received any counseling about job performance. Dkt. 29 at p. 3. Ms. Egnell  
16 stated in her deposition that she was offended by Plaintiff once during a discussion when  
17 Plaintiff compared her to an assassin played by Lucy Liu in the “Kill Bill” movies. Dkt. 22-1 at  
18 p. 14. Ms. Egnell stated in her declaration that, in a conversation with Plaintiff, Plaintiff referred  
19 to Skanska’s performance management process as a “waste of time” and said that the only reason  
20 people do performance reviews is to avoid getting fired. Dkt. 24 at p. 2; *see also* Dkt. 22-1 at p.  
21 16. In his deposition, Plaintiff admitted that these incidents occurred. Dkt. 22-1 at pp. 14–16.  
22 Despite these incidents, Plaintiff received satisfactory or above satisfactory performance reviews  
23 in all but three out of twenty-eight areas in February 2013, six months before he was terminated.  
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1 Dkt. 34-2 at p. 6. The three areas Plaintiff received less than satisfactory reviews in were listed as  
2 “Development Areas.” *Id.* Plaintiff received the maximum bonus every year possible. Dkt. 29 at  
3 p. 3.

4 In the summer of 2013, while Plaintiff still worked at Skanska, Ms. Egnell decided to  
5 reorganize learning and talent management at Skanska. Dkt. 24 at p. 3. Skanska hired an  
6 executive search firm to advertise for a position titled Senior Manager, Talent Development &  
7 Learning that included all of Plaintiff’s duties. *Id.* at p. 4. Plaintiff and Defendants disagree about  
8 whether the advertised position contained duties in addition to those that Plaintiff performed  
9 when he was Senior Director of Learning. *See* Dkt. 35 at p. 3; Dkt. 29 at p. 6; Dkt. 37-1 at pp. 5–  
10 11; Dkt. 30 at p. 3; Dkt. 33 at pp. 8–9, 12–15. Ms. Egnell interviewed at least two people, first  
11 offering the position to a man named Marco Deraney, who, Ms. Egnell said, “could be  
12 approximately 50 years of age.” Dkt. 24 at p. 4. Mr. Deraney declined the offer because the  
13 salary was not high enough and because it would have added to his commute. *Id.* at p. 4. Ms.  
14 Egnell stated in her declaration that she next offered the position to a thirty-four year old woman  
15 named Jamie Diamante who accepted the offer. *Id.* Ms. Egnell claimed in her declaration that she  
16 did not consider Plaintiff for the position because of the comments Plaintiff made that had  
17 offended her and his statements he did not believe in employee reviews. *Id.* at p. 3.

18 Ms. Egnell stated in her declaration that she spoke with the Chief Human Resources and  
19 Communications Officer at Skanska, Thomas Crane, about the need to terminate Plaintiff, and  
20 Mr. Crane approved the termination. *Id.* at p. 3. Ms. Egnell claimed in her declaration that  
21 Plaintiff’s position was eliminated when the company created the new position. *Id.* at p. 4. At  
22 Plaintiff’s mid-term review on August 14, 2013, Ms. Egnell terminated Plaintiff. *Id.* That same  
23 day, Ms. Egnell announced that Ms. Diamante would be starting as Skanska’s Senior Manager,  
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1 Talent Development & Learning. Dkt. 33 at p. 11. Several months later, while briefing a vendor  
 2 on changes at Skanska, Ms. Egnell referred to Ms. Diamante in an email as Plaintiff's  
 3 "replacement." Dkt. 33 at p. 15.

4 Since Skanska terminated Plaintiff, he has officially applied for one job. Dkt. 20 at pp.  
 5 17–18. Plaintiff decided to pursue a Ph.D. in Industrial and Organizational Psychology. Dkt. 29  
 6 at p. 4. Plaintiff stated in his deposition that he has not applied to more jobs because "I looked at  
 7 some other jobs, but they were all – typically the salaries that they're seeking are significantly  
 8 lower, and it would distract me from my primary objective, which is to get the degree." Dkt. 22-  
 9 1 at p. 3. Defendants have identified three jobs they found through online searches that Plaintiff  
 10 qualified for; however, the salary is not listed. Dkt. 21-1. Plaintiff claims that he wants to obtain  
 11 his Ph.D. because he believes the degree is necessary to obtain a job with the same salary level  
 12 he had at Skanska. Dkt. 22-1 at p. 3.

### 13 III. SUMMARY JUDGMENT STANDARD

14 Summary judgment is proper only if the pleadings, the discovery and disclosure materials  
 15 on file, and any affidavits show that there is no genuine issue as to any material fact and that the  
 16 movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is  
 17 entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient  
 18 showing on an essential element of a claim in the case on which the nonmoving party has the  
 19 burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of  
 20 fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for  
 21 the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586  
 22 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some  
 23 metaphysical doubt."). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a  
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1 In their Motion for Summary Judgment (Dkt. 20), Defendants assert that Plaintiff's age  
2 discrimination claim is baseless. Dkt. 20 at p. 9. Defendants claim that Plaintiff cannot establish  
3 a prima facie case because he was not performing his job satisfactorily and he was not replaced  
4 because his position was eliminated. *Id.* at 13. Defendants also claim that their offering the job  
5 first to Marco Deraney precludes Plaintiff's claims because Mr. Deraney is male and over forty.  
6 *Id.* at 14. Moreover, Defendants argue that even if Plaintiff can establish a prima facie case he  
7 cannot establish pretext. *Id.* Defendants' stated reasons for terminating Plaintiff are that his  
8 position was eliminated and that he was performing poorly. *Id.* at 14–16.

9 Plaintiff responds in his Memorandum in Opposition to Defendants' Motion for  
10 Summary Judgment (Dkt. 28) that he can establish a prima facie case, and issues of material fact  
11 exist regarding several elements. First, Plaintiff contends that issues of material fact exist  
12 regarding whether he was doing satisfactory work. Dkt. 28 at p. 3. Additionally, although  
13 Plaintiff asserts that no dispute exists on whether he was replaced by a woman in her thirties, he  
14 argues that issues of fact exist on whether Jamie Diamante was hired for the same position from  
15 which he was terminated. *Id.* at pp. 4–6. Plaintiff claims that because Ms. Diamante replaced  
16 Plaintiff, Defendants' purported reason for firing Plaintiff—eliminating his position—is false. *Id.*  
17 at pp. 6–7. Plaintiff also argues that he used reasonable care in seeking new positions, based on  
18 the market, and that the question also belongs to the jury. *Id.* at 7.

19 In their Reply in Support of Defendants' Motion for Summary Judgment (Dkt. 35),  
20 Defendants claim that Plaintiff's declaration opposing summary judgment (Dkt. 29) "is a sham  
21 and must be stricken." Dkt. 35 at pp. 1–2. They also argue that Plaintiff cannot create a material  
22 issue of fact by contradicting his own testimony. *Id.* at 2. Defendants contend that Plaintiff  
23 abandoned his gender discrimination claims and claims against Mr. Crane by not directly  
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1 rebutting Defendants' arguments for summary judgment on those claims in his response brief  
 2 (Dkt. 28). *Id.* at 3, 9. They also reassert their argument that Plaintiff cannot establish pretext and  
 3 that Plaintiff failed to mitigate damages. *Id.* at 4–8, 10.

## 4 2. Legal Standard.

5 It is unlawful for employers “[t]o discharge . . . any person from employment because of  
 6 age.” RCW § 49.60.180(2). To create a prima facie case of age discrimination, “a plaintiff must  
 7 show that he or she (1) was within the statutorily protected age group; (2) was discharged by the  
 8 defendant; (3) was doing satisfactory work; and (4) was replaced by a significantly younger  
 9 person.” *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 188 (citing *Grimwood v. Univ. of*  
 10 *Puget Sound, Inc.*, 110 Wn.2d 355, 362 (1988) (overruled on other grounds). The recently  
 11 decided Washington Supreme Court case of *Scrivener v. Clark College* illustrates the law well:

12 At trial, the WLAD plaintiff must ultimately prove that age was a “substantial  
 13 factor” in an employer's adverse employment action. *Mackay v. Acorn Custom*  
 14 *Cabinetry, Inc.*, 127 Wash.2d 302, 310, 898 P.2d 284 (1995). A “substantial  
 15 factor” means that the protected characteristic was a significant motivating factor  
 bringing about the employer's decision. *See id.* at 311 . . . . It does not mean that  
 the protected characteristic was the sole factor in the decision. *See Mackay*, 127  
 Wash.2d at 310–11 . . . .

16 Relatedly, summary judgment to an employer is seldom appropriate in the  
 17 WLAD cases because of the difficulty of proving a discriminatory motivation.  
 18 *See Riehl v. Foodmaker, Inc.*, 152 Wash.2d 138, 144, 94 P.3d 930 (2004);  
 19 *Sangster v. Albertson's, Inc.*, 99 Wash.App. 156, 160, 991 P.2d 674 (2000)  
 (“Summary judgment should rarely be granted in employment discrimination  
 20 cases.”); *see also Rice v. Offshore Sys., Inc.*, 167 Wash.App. 77, 90, 272 P.3d 865  
 (2012) (When the record contains reasonable but competing inferences of both  
 21 discrimination and nondiscrimination, the trier of fact must determine the true  
 motivation.). To overcome summary judgment, a plaintiff only needs to show that  
 a reasonable jury could find that the plaintiff's protected trait was a substantial  
 factor motivating the employer's adverse actions. *Riehl*, 152 Wash.2d at 149, 94  
 P.3d 930. “This is a burden of production, not persuasion, and may be proved  
 through direct or circumstantial evidence.” *Id.*

22 Where a plaintiff lacks direct evidence, Washington courts use the burden-  
 23 shifting analysis articulated in *McDonnell Douglas*, 411 U.S. 792, 93 S.Ct. 1817,  
 to determine the proper order and nature of proof for summary judgment. *Hume v.*  
 24 *Am. Disposal Co.*, 124 Wash.2d 656, 667, 880 P.2d 988 (1994). . . .

Under the first prong of the *McDonnell Douglas* framework, a plaintiff bears the initial burden of establishing a prima facie case of discrimination, which creates a presumption of discrimination. *Riehl*, 152 Wash.2d at 149–50, 94 P.3d 930; *Kastanis v. Educ. Emps. Credit Union*, 122 Wash.2d 483, 490, 859 P.2d 26, 865 P.2d 507 (1993). Once the plaintiff establishes a prima facie case, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wash.2d 355, 363–64, 753 P.2d 517(1988).

“If the Defendant meets this burden, the third prong of the *McDonnell Douglas* test requires the Plaintiff to produce sufficient evidence that Defendant’s alleged nondiscriminatory reason for [the employment action] was a pretext.” *Hume*, 124 Wash.2d at 667, 880 P.2d 988. Evidence is sufficient to overcome summary judgment if it creates a genuine issue of material fact that the employer’s articulated reason was a pretext for a discriminatory purpose. *Id.* at 668, 880 P.2d 988; *Grimwood*, 110 Wash.2d at 364, 753 P.2d 517; *Riehl*, 152 Wash.2d at 150, 94 P.3d 930.

If the plaintiff satisfies the *McDonnell Douglas* burden of production requirements, the case proceeds to trial, unless the judge determines that no rational fact finder could conclude that the action was discriminatory. *Hill v. BCTI Income Fund–I*, 144 Wash.2d 172, 186, 188–89, 23 P.3d 440 (2001), *overruled on other grounds* by *McClarty v. Totem Elec.*, 157 Wash.2d 214, 137 P.3d 844 (2006). . . .

. . . An employee may satisfy the pretext prong by offering sufficient evidence to create a genuine issue of material fact either (1) that the defendant’s reason is pretextual or (2) that although the employer’s stated reason is legitimate, discrimination nevertheless was a substantial factor motivating the employer. *Fell v. Spokane Transit Auth.*, 128 Wash.2d 618, 643 n. 32, 911 P.2d 1319 (1996); *see Wilmot v. Kaiser Alum. & Chem. Corp.*, 118 Wash.2d 46, 73, 821 P.2d 18 (1991); *Grimwood*, 110 Wash.2d at 365, 753 P.2d 517. An employee does not *need* to disprove each of the employer’s articulated reasons to satisfy the pretext burden of production. Our case law clearly establishes that it is the plaintiff’s burden at trial to prove that discrimination was a substantial factor in an adverse employment action, not the only motivating factor. *See Mackay*, 127 Wash.2d at 309–11, 898 P.2d 284. An employer may be motivated by multiple purposes, both legitimate and illegitimate, when making employment decisions and still be liable under the WLAD. *See Mackay*, 127 Wash.2d at 309–11, 898 P.2d 284.

*Scrivener v. Clark Coll.*, 334 P.3d 541, 545–46 (Wash. 2014) (en banc).

### 3. Merits of the Claim

As discussed above, Defendants contend that Plaintiff cannot establish a prima facie case. The Court disagrees, at least to the extent that material issues of fact exist.

1 Both parties agree that Plaintiff is within the statutorily protected age group because he  
2 was age sixty when he was terminated. Dkt. 20 at p. 10. Likewise, both parties agree that  
3 Plaintiff was discharged. Dkt. 20 at p. 1. Thus, the first two elements of age discrimination are  
4 not disputed. As for whether Plaintiff was doing satisfactory work at the time he was discharged,  
5 material issues of fact exist. For example, Plaintiff received the highest bonus possible in each  
6 recent year. Dkt. 30 at p. 2; Dkt. 31 at p. 1–2. Although Defendants documented several  
7 instances of frustration with Plaintiff, *see* Dkt. 25 at p. 3–11, Plaintiff also submitted a review  
8 from six months before his discharge praising his work and rating him as “Outstanding,”  
9 “Skilled”, and having “Clear Strength” in all but three areas. Dkt. 34-2 at p. 6. These and other  
10 pieces of evidence create a genuine issue of fact on the element of satisfactory work that must be  
11 resolved by a fact finder.

12 Moving to whether Plaintiff was replaced by someone significantly younger, Defendants  
13 claim that Plaintiff was not replaced because his position was eliminated, while Plaintiff claims  
14 that Ms. Diamante is performing the same job by a different title. Dkt. 20 at p. 1. Among other  
15 things, Defendants argue that Plaintiff was never in charge of “talent development,” but Ms.  
16 Diamante is. Dkt. 24 at p. 3. In support of this position, Defendants submitted documents such as  
17 Ms. Diamante’s deposition (Dkt. 22-1 at pp. 26–31) and Ms. Diamante’s job description (Dkt. 24  
18 at pp. 6–10). Defendants contend that Plaintiff admitted in his deposition that Ms. Diamante’s  
19 job differs from his. Dkt. 35 at pp. 8–9. Plaintiff, in response, submitted an email from Ms.  
20 Egnell describing Ms. Diamante as Plaintiff’s “replacement.” Dkt. 33 at p. 15. Additionally, the  
21 announcement of Plaintiff’s hiring describes his job as “to enhance the career growth of our  
22 personnel . . . .” Dkt. 30 at p. 3. Plaintiff argues this description means talent development. The  
23 Court’s role at summary judgment is not to weigh this evidence. *See Anderson*, 477 U.S. at 253  
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1 (1986). Plaintiff has submitted evidence sufficient to create material issues of fact regarding  
2 whether Ms. Egnell replaced him or filled a new and different position.

3 Defendants argue that first offering the position of Learning & Development Director to  
4 Mr. Deraney, who appeared to be over the age of forty, defeats Plaintiff's prima facie claim of  
5 age discrimination. Dkt. 20 at p. 14. In support of this argument, Defendants cite *Cousins v.*  
6 *Kitsap County*, No. 08-CV-05764-KLS, 2010 U.S. Dist. LEXIS 138532 (W.D. Wash. Dec. 29,  
7 2010). That case is not on point. In *Cousins*, although the position was offered to a person in the  
8 same protected class as the plaintiff—a woman—the offeree also accepted the position. *Id.* at \*6.  
9 In this case, the position was offered to Mr. Deraney, a man over the age of forty years old, but  
10 Mr. Deraney did not accept. Dkt. 24 at p. 4. Thus, the case is not persuasive. Defendants have  
11 cited no authority that offering the position to someone in the same protected class, even if the  
12 person does not accept, defeats a prima facie claim of discrimination. In this case, even if Mr.  
13 Deraney had accepted the position, Plaintiff's prima facie case would not necessarily be  
14 defeated. The fourth element is being replaced by someone "significantly younger," not someone  
15 outside the protected class. *Hill*, 144 Wn.2d at 188 (citing *Coin Caterers Corp.*, 517 U.S. 308,  
16 312–13 (1996)). If Mr. Deraney was fifty years old, as Defendants claimed he appeared to be, he  
17 would still have been ten years younger than Plaintiff. A jury could find that that difference is  
18 significant, so issues of material fact would still exist. Offering the position to Mr. Deraney does  
19 not defeat Plaintiff's prima facie case of age discrimination.

20 Since Plaintiff met his summary judgment burden of production of submitting evidence  
21 showing a prima facie case, Defendants must then "articulate a legitimate, nondiscriminatory  
22 reason" for terminating Plaintiff. *Scrivener*, 334 P.3d at 546. Defendants have met this burden.  
23 Defendants submit that their legitimate reason for terminating Plaintiff was because they  
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1 eliminated his position. Dkt. 20 at p. 1. To show Ms. Diamante's job is a new position,  
2 Defendants submitted evidence, including Ms. Diamante's job description (Dkt. 24 at pp. 6–10);  
3 Ms. Diamante's testimony describing her position (Dkt. 22-1 at pp. 26–31); testimony from Ms.  
4 Egnell (Dkt. 24); as well as Plaintiff's own admissions in his deposition (Dkt. 37-1). Thus,  
5 Defendants have articulated a legitimate, nondiscriminatory reason for terminating Plaintiff.

6 Since Defendants met their burden, Plaintiff must "create a genuine issue of material fact  
7 either (1) that the defendant's reason is pretextual or (2) that although the employer's stated  
8 reason is legitimate, discrimination nevertheless was a substantial factor motivating the  
9 employer." *Scrivener*, 334 P.3d at 546. Plaintiff has presented sufficient evidence to create a  
10 genuine issue of material fact that Defendants' reason is pretextual. As discussed above, Plaintiff  
11 presented evidence creating a genuine issue of material fact of whether his position was  
12 eliminated, calling into question Defendants' articulated reason. Plaintiff has created a genuine  
13 issue of material fact that Defendants' articulated reason was a pretext for discrimination.  
14 Plaintiff's age discrimination claim should not be dismissed on summary judgment.

#### 15 B. Gender Discrimination

16 Plaintiff has also alleged Defendants discriminated against him on the basis of gender in  
17 violation of the WLAD. Dkt. 20 at p. 1. The prima facie elements of a gender discrimination  
18 claim are almost identical to those of age discrimination: a male plaintiff must show that he (1)  
19 was a male; (2) was discharged by the defendant; (3) was doing satisfactory work; and (4) was  
20 replaced by a woman. *See Fulton v. State Dept. of Soc. & Health Servs.*, 169 Wn. App. 137, 150  
21 (2012) (citations omitted). Similar to Plaintiff's above age discrimination claim, the first two  
22 elements of his gender discrimination claim are not disputed. Elements three, however, is in  
23 issue. Defendants argue that having first offered the position to Mr. Deraney defeats Plaintiff's  
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1 prima facie case of gender discrimination. Dkt. 20 at p. 14. Despite Defendants' arguments,  
2 issues of material fact exist on element four.

3 In his Memorandum in Opposition to Defendants' Motion for Summary Judgment (Dkt.  
4 28), Plaintiff did not address his gender discrimination claim. Federal Rule of Civil Procedure  
5 56(e) states:

6 "If a party fails to properly support an assertion of fact or fails to properly  
7 address another party's assertion of fact as required by Rule 56(c), the court  
8 may . . . (2) consider the fact undisputed for purposes of the motion; (3) grant  
summary judgment if the motion and supporting materials—including the facts  
considered undisputed—show that the movant is entitled to it . . . ."

9 Fed. R. Civ. P. 56(e). The Court will take facts Defendants asserted specific to Plaintiff's  
10 gender discrimination claim as undisputed.

11 As discussed above regarding Plaintiff's age discrimination claim, Plaintiff has  
12 not cited any authority that first offering a position to someone of the same gender  
13 defeats a gender discrimination claim. Dkt. 20 at p. 14. Additionally, although Plaintiff  
14 stated that his gender claim was only based on being replaced by a woman, he also put  
15 evidence in the record creating a prima facie case. *See supra* discussion at Part IV.A.3.  
16 Plaintiff submitted evidence showing material issues of fact regarding Defendants'  
17 proffered explanation for terminating Plaintiff. *Id.* Therefore, for the same reasons as  
18 discussed above regarding Plaintiff's age discrimination claim, Plaintiff has shown  
19 material issues of fact exist, making summary judgment inappropriate on Plaintiff's  
20 gender discrimination claim.

### 21 C. Claims Against Thomas Crane

22 Plaintiff sued Maja Egnell, Skanska, and Thomas Crane for age discrimination. Dkt. 20 at  
23 p. 1. Defendants have submitted evidence that Maja Egnell made the decision to terminate  
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Plaintiff, not Thomas Crane. Dkt. 23 at p. 3; Dkt. 24 at p. 3. Plaintiff did not rebut this fact in his Memorandum in Opposition to Defendants' Motion for Summary Judgment. Dkt. 28. Therefore, the Court will consider Defendants' assertion undisputed for purposes of this motion. Fed. R. Civ. P. 56(e)(2). Based on the undisputed facts, Plaintiff has failed to show Mr. Crane made the decision to terminate him. Summary judgment should be granted dismissing all Plaintiff's claims against Mr. Crane.

#### D. Damages Mitigation

Defendants contend that, even if Plaintiff was discriminated against, Plaintiff has failed to act reasonably in mitigating his damages. Dkt. 20 at pp. 17–18. “[T]he burden is on the employer to prove that the employee failed to mitigate damages in an age discrimination suit.” *Herring v. DSHS*, 81 Wn. App. 1, 19 (1996) (citing *Burnside v. Simpson Paper Co.*, 66 Wn. App. 510, 529–30 (1992)). The employer must show that “there were suitable positions available and that [the plaintiff] ‘failed to use reasonable care and diligence in seeking them.’” *Id.* Defendants have submitted evidence of positions that Plaintiff appears qualified for and argue that Plaintiff acted unreasonably by only applying to one job. Dkt. 21-1. Issues of material fact still exist, however, such as what the salary of those positions were. Additionally, Plaintiff claims that his pursuing a Ph.D. is a reasonable method of mitigating his damages, in light of the market for his skills, and that he is diligently pursuing employment through obtaining his Ph.D. Dkt. 28 at p. 7; *see also* Dkt. 37-1 at p. 2–3. Because disputed issues of material fact exist as to whether Plaintiff properly took steps to mitigate his damages, summary judgment is not warranted.

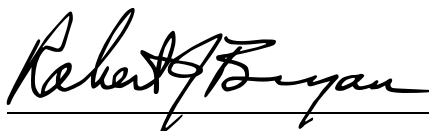
Accordingly, it is **ORDERED** that:

- Defendants' Motion for Summary Judgment (Dkt. 20) is **GRANTED** regarding all claims against Thomas Crane, and all claims against this defendant are **DISMISSED**;

- Defendants' Motion for Summary Judgment (Dkt. 20) is **DENIED** regarding Plaintiff's age and gender discrimination claims against Skanska and Ms. Egnell, and these claims may proceed.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing pro se at said party's last known address.

Dated this 28<sup>th</sup> day of October, 2014.

A handwritten signature in black ink, reading "Robert J. Bryan", written over a horizontal line.

ROBERT J. BRYAN  
United States District Judge